Supreme Court, U.S.
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No. 94-1689

In the Supreme Court of the United States

OCTOBER TERM, 1994

FLORENCE J. GILBERT, ET AL., PETITIONERS

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL SECURITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners had standing to challenge notices from the Social Security Administration denying their claims for disability benefits on the ground that the notices did not adequately explain their appeal rights, when petitioners failed to show that they relied on the notices in deciding not to appeal.

2. Whether petitioner Neal was entitled to attorney's fees under the Equal Access to Justice Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Allen v. *Wright*, 468 U.S. 737 (1984)	8
Burks-Marshall v. *Shalala*, 7 F.3d 1346 (8th Cir. 1993)	9
Christopher v. *Secretary of HHS*, 702 F. Supp. 41 (N.D.N.Y. 1989)	9
Commissioner, INS v. *Jean*, 956 U.S. 154 (1990)	12
Cuffee v. *Sullivan*, 842 F. Supp. 1219 (W.D. Mo. 1993)	11
Day v. *Shalala*, 23 F.3d 1052 (6th Cir. 1994)	9, 10
Gilbert v. *Sullivan*, No. 93-2309, 1995 WL 91120 (1st Cir. Mar. 6, 1995)	11
Gonzalez v. *Sullivan*, 914 F.2d 1197 (9th Cir. 1990)	9
Goodman v. *Lukens Steel Co.*, 482 U.S. 656 (1987)	8
Hagans v. *Lavine*, 415 U.S. 528 (1974)	9
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992)	7, 8
McKart v. *United States*, 395 U.S. 185 (1969)	13
Parisi v. *Davidson*, 405 U.S. 34 (1972)	13
Pennhurst State School & Hospital v. *Halderman*, 465 U.S. 89 (1984)	9
Torres v. *Shalala*, 48 F.3d 887 (5th Cir. 1995)	9
Weinberger v. *Salfi*, 422 U.S. 749 (1975)	13

Constitution, statutes and regulations:

U.S. Const. Art. III, § 2	7, 8, 11, 12
Equal Access to Justice Act, 28 U.S.C. 2412	6

Statutes and regulations—Continued: Page

Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388:
§ 5107(a)(1), 104 Stat. 1388-269 (42 U.S.C. 405(b)(3) (Supp. V 1993)) 4
§ 5107(b), 104 Stat. 1388-269 4
Social Security Act, 42 U.S.C. 301 *et seq.*:
Tit. II, 42 U.S.C. 401-433 (1988 & Supp. V 1993) 2, 4, 9
42 U.S.C. 405(g) 3
42 U.S.C. 423(b) 3
Tit. XVI, 42 U.S.C. 1381-1383d (1988 & Supp. V 1993) 2, 4
Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464:
§ 105(a) (1), 108 Stat. 1472 1
§ 106(d), 108 Stat. 1477 1
20 C.F.R.:
Pt. 404 2
Section 404.621(a) 3-4
Section 404.902 2
Section 404.904 2
Section 404.905 2
Section 404.921 3
Section 404.922 3
Section 404.953 3
Section 404.968 3
Sections 404.987-404.989 4
Section 404.1503 2
Pt. 416 2
Section 416.335 4
Sections 416.1010-416.1018 2
Section 416.1402 2
Section 416.1404 2

Regulations—Continued: Page

Section 416.1405 2
Section 416.1421 3
Section 416.1422 3
Section 416.1453 3
Section 416.1468 3
Sections 416.1487-416.1489 4

Miscellaneous:

56 Fed. Reg. (1991):
p. 29,971 (Social Security Ruling 91-5p) 5, 13
p. 29,972 5
60 Fed. Reg. 20,549 (1995) (Social Security Ruling 95-1p) 12

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is reported at 45 F.3d 1391. The opinion of the district court dismissing the case (Pet. App. 16-27) is

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[1] Section 105(a)(1) of the Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1472, transferred the functions of the Secretary of Health and Human Services "with respect to or in support of the programs and activities the administration of which is vested in the Social Security Administration" to the Commissioner of Social Security, effective March 31, 1995. Under Section 106(d) of the Act, 108 Stat. 1477, Shirley S. Chater, Commissioner of Social Security, should be substituted for Donna E. Shalala, Secretary of Health and Human Services, as the defendant-respondent in this action.

reported at 828 F. Supp. 815. The order of the district court denying petitioner Neal's request for attorney's fees (Pet. App. 10-14) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1995. The petition for a writ of certiorari was filed on April 17, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioners applied for disability insurance benefits under Title II of the Social Security Act and for Supplemental Security Income benefits under Title XVI of the Act. See 42 U.S.C. 401-433 (1988 & Supp. V 1993) (Title II), 1381-1383d (1988 & Supp. V 1993) (Title XVI); see also 20 C.F.R. Pts. 404 (Title II regulations), 416 (Title XVI regulations). The Social Security Administration (SSA) made initial determinations that petitioners were not eligible for benefits and notified them of that determination in writing. See 20 C.F.R. 404.902, 416.1402.[2] The notice advised each petitioner that he or she could ask for reconsideration of the initial determination. See Pet. App. 18-19 (reproducing relevant language in denial notices); see also 20 C.F.R. 404.904, 416.1404. Petitioners Blair, Neal, and London failed to ask for reconsideration, causing the initial determinations to become binding. See 20 C.F.R. 404.905, 416.1405; see generally Pet. App. 2, 18.

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[2] Disability determinations are initially made by the State in which the claimant resides under regulations and policies promulgated by SSA. See 20 C.F.R. 404.1503, 416.1010-416.1018. For the sake of simplicity, we will refer to SSA as the decisionmaker at each stage.

The other two petitioners, Gilbert and Robinson, sought reconsideration, which was denied. Pet. App. 18. The written notice of the denial of reconsideration advised them that they could request a *de novo* hearing before an administrative law judge (ALJ). *Id.* at 18-19; see also 20 C.F.R. 404.922, 416.1422.[3] Petitioner Gilbert did not request a hearing; petitioner Robinson initially requested one, but later withdrew her request because she found work. Pet. App. 18; C.A. App. 330-331.[4] Their failure to seek further administrative review caused the reconsideration decisions to become binding. 20 C.F.R. 404.921, 416.1421.

After an adverse determination on an application for disability benefits becomes binding, the claimant may file a new application. But if the new application is granted, benefits are generally awarded based solely on the date upon which the new application was filed. Specifically, Title II disability benefits may be awarded for up to 12 months prior to the month in which the new application was filed, 42 U.S.C. 423(b); 20 C.F.R.

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[3] If the claimant makes a timely request, the ALJ will hold a hearing and issue a ruling based on the evidence presented at the hearing or otherwise contained in the record. See 20 C.F.R. 404.953, 416.1453. A claimant who is dissatisfied with the ALJ's decision may appeal to the Appeals Council of SSA within 60 days of receiving notice of the ALJ's decision. See 20 C.F.R. 404.968, 416.1468. A claimant dissatisfied with the Appeals Council's action may seek judicial review in federal district court within 60 days. See 42 U.S.C. 405(g).

[4] The district court incorrectly stated that petitioner Robinson "appealed throughout the administrative process and obtained a favorable decision." Pet. App. 18. As stated in the text, SSA denied Robinson's request for reconsideration. C.A. App. 325, 328.

404.621(a), and SSI benefits may be awarded beginning with the month in which the new application was filed, 20 C.F.R. 416.335. Only in certain specified circumstances may a decision denying a prior claim be "reopened" and benefits awarded for prior periods.[5] In the absence of such circumstances, the denial of the prior claim has preclusive effect (for the time period covered by that claim) by virtue of the doctrine of administrative res judicata.[6]

b. Years after their claims were denied, petitioners filed new applications for disability benefits under Titles II and XVI. In the new applications, they sought to have their prior claims reopened and benefits awarded based on the prior applications. In addition to

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[5] A claim for benefits may be reopened (1) within 12 months of the initial determination, for any reason; (2) within four years (for Title II benefits) or two years (for SSI benefits) of the initial determination, for "good cause"; or (3) at any time, in certain extraordinary cases (for example, cases involving fraud). See 20 C.F.R. 404.987-404.989, 416.1487-416.1489.

[6] In 1990, Congress amended the Social Security Act to preclude the application of administrative res judicata to adverse determinations by SSA made on or after July 1, 1991, if the claimant failed to file a timely appeal "in good faith reliance upon incorrect, incomplete, or misleading information, relating to the consequences of reapplying for benefits in lieu of seeking review of an adverse determination, provided by any officer or employee of the [SSA]." Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 5107(a)(1), 5107(b), 104 Stat. 1388-269, codified at 42 U.S.C. 405(b)(3) (Supp. V 1993). The amendment does not apply to the adverse determinations that petitioners sought to have reopened in this action, because they were made before July 1991. See C.A. App. 636. In any event, petitioners do not advance any claim under the 1990 amendment.

filing the new applications, petitioners filed this action in the United States District Court for the District of Colorado. Petitioners contended that their prior claims should be reopened because the denial notices that they received from SSA violated due process. In particular, they argued that the notices concerning their prior applications did not adequately explain that they could not obtain benefits based on those applications if they made new applications.

c. During the course of the litigation, SSA decided to review petitioner Neal's prior applications for disability benefits pursuant to Social Security Ruling (SSR) 91-5p, 56 Fed. Reg. 29,971 (1991). SSR 91-5p codifies a long-standing agency policy providing that SSA may review an adverse determination on a prior application, even after the time for appealing the adverse determination has expired, if the claimant was unrepresented at the time of the prior determination and lacked the mental capacity to pursue an appeal. *Id.* at 29,972. Applying that policy here, SSA awarded petitioner Neal the benefits he sought in this litigation. See Pet. App. 3, 7, 25.[7]

2. The district court granted summary judgment in favor of the government. Pet. App. 16-27. It held that petitioner Neal's claim was moot because SSA had

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[7] SSR 91-5p provides for an extension of the time within which an adverse determination may be reviewed. As a technical matter, that sort of relief differs from the reopening of a prior claim. Either form of relief, however, may lead to an award of retroactive benefits. Because the courts below described the administrative relief accorded to petitioner Neal as a "reopening" (Pet. App. 7, 25)—and because the difference between an extension of the deadline for seeking review and the reopening of a prior claim is not significant for purposes of this case—we will use the same term hereafter.

reopened his prior claim and awarded him all the benefits that he sought in this action. *Id.* at 25. The district court further held that the other petitioners lacked standing to challenge SSA's denial notices. The court observed that none of the petitioners had shown that they had failed to appeal the denial of their prior claims as a result of the allegedly defective denial notices. It accordingly concluded that petitioners had not shown that the alleged defect caused them any harm. *Id.* at 22-27.

In a later order, the district court denied petitioner Neal's request for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412. Pet. App. 10-14. The court observed that, under the EAJA, "[a]n award of fees and other expenses [to a prevailing party] is mandatory unless the court finds that the government's position was substantially justified." *Id.* at 12. The court determined that, "[i]n this case, the government advanced reasonable defenses against Neal's claim, the most fundamental of which was his lack of standing." *Ibid.* The court rejected Neal's argument that SSA's eventual decision to reopen his prior claims established that SSA's position was not substantially justified. It explained that "[t]his reopening [was] based on grounds other than those challenged [here]," namely, "Neal's mental impairment and lack of legal representation" at the time of his prior application. *Id.* at 13. The court therefore concluded that, although the reopening was "arguably sufficient to allow Neal to assert prevailing party status," it did not "transform the government's case into an insubstantial one." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1-7. It held, first, that petitioners "failed to present evidence

that they meet the Article III requirement of standing." *Id.* at 4. It explained (*ibid.*):

> [Petitioners] have not shown a causal connection between their injury and the allegedly deficient denial notices. To the contrary, the record in this case clearly establishes a lack of reliance by [petitioners] upon the notices. In deposition testimony or affidavits, [petitioners] stated either that they relied on sources other than the challenged language in believing that they could reapply and receive retroactive benefits, or could not remember reading the challenged language.

The court also held that petitioner Neal was not entitled to an EAJA award because the government's position was substantially justified. *Id.* at 6-7. In the court's view, "the government was reasonable in its defense that [petitioner] Neal lacked standing * * * [and] in its position that the denial notices were constitutionally adequate." *Id.* at 6.

ARGUMENT

1. The court of appeals correctly held that petitioners lack standing to contest the adequacy of the notice denying their prior claims for disability benefits. That holding, contrary to petitioners' contention (Pet. 10-14), does not conflict with any decision of another court of appeals. Further review is therefore not warranted.

The Constitution limits the power of the federal courts to deciding "Cases" and "Controversies." U.S. Const. Art. III, § 2. Standing "is an essential and unchanging part of the case-or-controversy requirement." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To have standing, a plaintiff must show

that he or she has (1) suffered "injury in fact" (2) that is "fairly . . . trace[able] to the challenged action of the defendant" and (3) that is "likely" to be "redressed by a favorable decision." *Id.* at 560-561; accord *Allen* v. *Wright*, 468 U.S. 737, 751 (1984).

As both lower courts held, petitioners failed to show that they suffered injury traceable to the allegedly defective notice. Pet. App. 4-5, 23-26. Petitioners alleged that they suffered a loss of benefits because they filed new applications rather than appealing the denial of their prior applications. Petitioners did not show, however, that their decisions not to pursue administrative appeals of the determinations denying their prior applications were based on the denial notices. If petitioners did not rely on the denial notices, then any defect in the notices caused them no harm. Because petitioners failed to show that the alleged defect in the notices led to their loss of benefits, the court of appeals correctly held that they lacked Article III standing.[8]

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[8] Petitioners do not challenge the finding of both courts below that they did not show actual reliance on the allegedly defective language in the denial notices. In any event, that concurrent finding by both courts below would not warrant further review. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987). Although petitioners do not directly challenge the finding of no reliance, they do include (Pet. 6) in their statement of facts the portion of petitioner Gilbert's deposition testimony that they cited in the courts below as evidence that she detrimentally relied on the notice. The district court correctly determined that Gilbert's testimony did not concern the language in the notices that petitioners have challenged in this action; instead, her testimony concerned a portion of the notice describing the eligibility requirements for widow disability benefits. See Pet. App. 23.

That holding accords with decisions in two other circuits that, like the present case, involved due process challenges to SSA's denial notice. In *Burks-Marshall* v. *Shalala*, 7 F.3d 1346 (1993), the Eighth Circuit held that the plaintiff lacked standing because "[s]he ha[d] not shown that the alleged deficiency in the notice had any connection in fact with her own failure to seek review of the two early denials." *Id.* at 1349. In *Torres* v. *Shalala*, 48 F.3d 887 (1995), the Fifth Circuit similarly held that the plaintiff "lack[ed] standing to raise the due process claim" because he "ha[d] not shown any causal connection between the allegedly misleading language in the first two notices and his subsequent failure to seek judicial review." *Id.* at 893.

Contrary to petitioners' contention, the decision below does not conflict with *Gonzalez* v. *Sullivan*, 914 F.2d 1197 (9th Cir. 1990). *Gonzalez* did not address the plaintiff's standing to challenge SSA's denial notice, and the court's consideration of that challenge on the merits cannot be deemed to have decided the standing issue by implication. See, *e.g.*, *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 119 (1984); *Hagans* v. *Lavine*, 415 U.S. 528, 535 n.5 (1974).[9]

Nor does the decision below conflict with *Day* v. *Shalala*, 23 F.3d 1052 (6th Cir. 1994). In *Day*, the Sixth Circuit held that the denial notice sent to Title II claimants at the reconsideration stage before February 1990 violated due process because it did not adequately explain the preclusive effect of a failure to appeal. *Id.* at 1064-1066. The Sixth Circuit further

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[9] Petitioners likewise err in relying (Pet. 12) on *Christopher* v. *Secretary of HHS*, 702 F. Supp. 41 (N.D.N.Y. 1989), which did not address the standing issue.

held, however, that only a "limited number of [the] class members" defined by the district court were entitled to relief because of that violation. *Id.* at 1066. It observed that "[t]he class certified by the District Court was not well defined" because it "fail[ed] to take into account the distinctions between the varying grounds for relief claimed by plaintiffs." *Id.* at 1057. The Sixth Circuit accordingly provided its own description of the class entitled to relief (*id.* at 1066):

> [T]he only claimants who could have been injured * * * are those who detrimentally relied on the inadequate denial notice. A claimant relied to his or her detriment on the inadequate notice if he or she was denied benefits at the reconsideration level then received the inadequate notice, and thereafter filed a new application rather than continuing the appeal process, and then were presented by the Secretary with a claim of *res judicata* or received less in retroactive benefits than he or she would have had they successfully appealed initially.

Petitioners' reliance (Pet. 10-11) on this passage to support their claim of a circuit conflict is misplaced. For one thing, the passage could be read to require claimants to show that they filed a new application "rather than continuing the appeal process" *because of* the defective notice. *Day*, 23 F.3d at 1066; see also *id.* at 1060 (excusing failure to exhaust administrative remedies) ("[T]he only class members who are entitled to reopen their claims for benefits are those who detrimentally relied on the inadequate Title II reconsideration denial notices used before February, 1990. By definition, these class members filed a new application when they should have continued the appeal process."). So read, the passage in *Day* is consistent

with the decision below. In any event, the passage does not refer to the plaintiffs' standing, which the government did not challenge. Instead, the passage was intended to delineate that portion of the class certified by the district court that was entitled to relief as a result of the court of appeals' ruling on the merits. The decision in *Day* therefore is not binding on the Sixth Circuit with respect to the standing issue presented here.

Petitioners cite (Pet. 11-12), and we are aware of, only one published decision that supports their claim of standing. In *Cuffee* v. *Sullivan*, 842 F. Supp. 1219 (W.D. Mo. 1993), the district court held that the plaintiff's mere receipt of a denial notice conferred Article III standing for a due process challenge to the notice. *Id.* at 1225. That holding, however, is no longer good law in light of the Eighth Circuit's later decision in *Burks-Marshall.*[10]

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[10] In an unpublished opinion not cited in the petition, the First Circuit cited the decision below in holding that "reliance on the defective [denial] notice [from SSA] is a core ingredient" of a due process challenge to the notice. *Gilbert* v. *Sullivan*, No. 93-2309, 1995 WL 91120, at *2 (Mar. 6, 1995). The First Circuit then cited *Day* for the proposition that "essentially objective criteria" may be used "to assess whether or not a claimant ha[s] established injury because of reliance" on a defective notice. *Id.* at *3. The First Circuit determined that the "historical facts of record support[ed] a finding of detrimental reliance" in that case. *Ibid.* The court cited the fact that the claimant filed her prior application pro se; that she testified that she did not know how to appeal the denial of that application; and that she filed a new application "for the same benefits." *Ibid.* It is not clear from the decision below whether the Tenth Circuit would consider such evidence sufficient to support an inference of detrimental reliance. In any event, any tension between the decision below and the

2. Petitioners also contend (Pet. 12-17) that the denial notices that they received violated due process. The courts below properly declined to address that contention, having correctly determined that none of the petitioners met the Article III requirements for raising it. Review of that contention by this Court therefore is not warranted.[11]

3. Petitioner Neal contends (Pet. 17) that the denial of his application for an EAJA award conflicts with *Commissioner, INS* v. *Jean*, 496 U.S. 154 (1990). That contention is based on the erroneous assertion (Pet. 17) that the court of appeals "failed to consider the pre-litigation action of [SSA]." On appeal, petitioner Neal cited only one pre-litigation action by SSA that he claimed showed that the government's position was not substantially justified, namely, SSA's refusal to reopen his prior claims. Pet. C.A. Br. 29-30. Neal argued that SSA's later decision to reopen his claims showed that its prior refusal to do so was not substantially justified. *Id.* at 28. The court of appeals expressly considered that argument, as well as the

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First Circuit's unpublished decision in *Gilbert* does not warrant further review.

[11] As petitioners acknowledge (Pet. 16), the versions of the denial notices that they received are no longer used. Moreover, SSA has recently announced that it will provide administrative relief to those individuals who can show that they relied on certain versions of the denial notices used prior to March 1990 in deciding to forgo appeals. SSR 95-1p, 60 Fed. Reg. 20,549 (1995). SSA's discontinuance of the use of denial notices like those challenged in this action, and SSA's provision of an administrative remedy for claimants who can show detrimental reliance on those notices, weigh against further review of petitioners' contention that the notices violated due process.

evidence in the record concerning the reopening of Neal's claims. Pet. App. 6-7 (citing C.A. App. 1118, 1121).[12] The court correctly held that that evidence did not impugn SSA's position for EAJA purposes because the evidence indicated that the reopening was unrelated to petitioners' due process challenge. *Ibid.*[13]

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[12] The evidence consisted of an internal SSA memorandum concerning the reopening of Neal's claims. See C.A. App. 1121. The memorandum stated (*ibid.*) that Neal's prior claims could be reopened under Social Security Ruling 91-5p, 56 Fed. Reg. 29,971 (1991), if at the time of his prior applications he was unrepresented and lacked the mental capacity to pursue an administrative appeal.

[13] The petition suggests (Pet. 6-9, 15-16) that petitioners Blair, Robinson, and London suffered from mental disorders that prevented them from understanding their rights when their prior applications were denied. Although the record contains some evidence that petitioner Robinson was mentally impaired at the time of the denial of her prior applications (see Pet. 8-9), any such impairments could not have affected her ability to pursue administrative review, because she was represented by legal counsel at all pertinent times. Petitioners Blair and London have not presented to SSA any claim that they suffered mental impairments at the time of the denial of their prior applications that prevented them from pursuing administrative review. As noted above (note 12, *supra*), SSA could consider such claims under SSR 91-5p. Because petitioners Blair and London have not exhausted their administrative remedies on that issue, it may not be raised here. See *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); *Parisi* v. *Davidson*, 405 U.S. 34 (1972); *McKart* v. *United States*, 395 U.S. 185 (1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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